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Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1990

WILLIE J. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

- AND APPENDICES -

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QUESTIONS PRESENTED

I.

WHETHER THE "SPILLOVER EFFECT" CREATED BY CO-DEFENDANTS' BIZARRE DEFENSE, DEFENSE WITNESSES, THEIR TESTIMONY, AND THE OVERWHELMING EVIDENCE AGAINST THEM COMPELS SEVERANCE IN ACCORD WITH CASE LAW.

II.

WHETHER THE TRIAL COURT'S REFUSAL TO ADMIT PETITIONER'S PROPOSED EVIDENCE CONCERNING HIS TOTAL BUSINESS ACTIVITY ON GROUNDS OF RELEVANCY WHERE THE GOVERNMENT'S EVIDENCE WAS MISLEADING CONSTITUTES REVERSIBLE ERROR.

III.

WHETHER THE JURY'S VERDICT THAT PETITIONER WAS GUILTY OF CONSPIRACY TO ILLEGALLY DISTRIBUTE PRESCRIPTION DRUGS, IN VIOLATION OF 21 USC 841(A)(1) and 846 WAS BASED UPON INSUFFICIENT EVIDENCE OR AGAINST THE GREAT WEIGHT OF THE EVIDENCE AS CONSTRUED BY PRIOR DECISIONS.

LIST OF PARTIES

The parties in the proceedings below were the petitioner, Willie J. Williams, co-defendants Roosevelt Taylor, D.O. and Wilbert Monroe Gurley; and United States of America, the plaintiff.

The respondent before this Court is the United States of America.

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WILLIE J. WILLIAMS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Willie J. Williams, respectfully prays that a writ of certiorari issue to review the judgment and opinion and order denying rehearing of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceedings on November 13, 1990, and December 13, 1990.

OPINIONS BELOW

The *per curiam* opinion of the Court of Appeals for the Sixth Circuit is reprinted in the appendix hereto, pp. C-1 *et seq.*, *infra*. The decision has not been reported.

The judgment and probational commitment order of the United States District Court for the Eastern District of Michigan is reprinted in the appendix hereto, pp. F-1 *et seq.*, *infra*. There was no written opinion by the trial court.

JURISDICTION

Invoking 21 USC 841(a)(1), 846 and 21 USC 853, the government, on July 22, 1987, caused to be issued a multi-

count indictment charging petitioner's co-defendants with violations of 21 USC 841(a)(1), 846 and 853. On March 10, 1989, a superseding indictment joined petitioner in two courts as a member of the conspiracy and charged him with violation of 21 USC 853. On August 10, 1989, the jury found petitioner guilty on all charges against him. A judgment and commitment order was entered on December 7, 1989. On petitioner's appeal, the Sixth Circuit on November 13, 1990, affirmed the trial court verdict and judgment and on December 13, 1990, denied petitioner's petition for rehearing.

The jurisdiction of this Court is invoked under 28 USC 1254(1) and S.Ct. Rules 20.1 and 20.4.

STATUTES INVOLVED

21 USC 841(a)(1):

> (a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance.

21 USC 846.

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

On July 22, 1987, Roosevelt Taylor, D.O., and Wilbert Monroe Gurley were named defendants by the United States of America in a 101-count criminal indictment. The indictment charged Taylor, in 96 counts, with unlawful distribution of controlled substances, namely, Schedule II-IV narcotic drugs. 21 USC 841(a)(1) and 846. Gurley was charged in four counts with unlawful delivery of Schedule IV controlled substances, namely, Valium and Talwin.

Defendant Taylor was charged with criminal conduct occurring between July 23, 1986 and March 10, 1987. All of the conduct charged against defendant Gurley occurred March 10, 1987.

The matter dragged on for several months as a result of defendant Taylor's questioned competency to stand trial. In addition, Taylor repeatedly claimed that he was the victim of a massive conspiracy to blame him for diverse criminal acts including those charged in the indictment. At trial, Taylor presented this as the cornerstone of his defense.

On March 10, 1989, a superseding indictment was filed by the United States of America charging Taylor, Gurley and petitioner Willie J. Williams, a registered pharmacist licensed by the State of Michigan, with the illegal distribution of Schedule II-V controlled substances, "outside the usual course of medical practice and for no legitimate medical purpose." The superseding indictment charged petitioner Williams with Count 1, conspiracy to illegally distribute prescription drugs contrary to 21 USC 841(a)(1) and 846; and, Count 19, criminal forfeiture pursuant to 21 USC 853. The criminal conspiracy alleged in Count 1 took place between October 1985 and August 1987 and involved Taylor, Gurley and petitioner Williams. The indictment charged Williams with accepting prescriptions issued by Taylor "despite the fact that Roosevelt Taylor,

D.O., did not have a federal license to issue prescriptions for controlled substances." Petitioner Williams then, according to the indictment, dispensed these prescriptions in generic form but billed at brand-name prices. In general terms, however, the indictment charged Williams with conspiring to distribute prescription drugs for no legitimate medical purpose.

In October or November 1987, the government first took note of the activities at Dort Drug Corporation and began investigating petitioner Williams. The Drug Enforcement Administration had maintained a record of controlled substance purchases and compiled a so-called ARCOS report. The ARCOS report for the first quarter of 1987 suggested that the Dort Drug Corporation had purchased a suspiciously large quantity of codeine-based controlled substances. Dort, in fact, was ranked ninth on the list of approximately 60 pharmacies identified in the report. It was this information, rather than the ongoing investigation of defendants Taylor and Gurley, that prompted the government to officially commence its investigation of petitioner Williams' activities on November 23, 1987.

Prior to trial, petitioner Williams' counsel became aware of the bizarre facts Taylor and, by reference, Gurley, would rely upon for their defense. Williams filed a motion for severance citing Federal Rule of Criminal Procedure 14. Petitioner noted the "conspiracy" defense Taylor had raised in earlier proceedings and argued that the defense would "so strain the patience and tolerance of reasonable minds" as to prejudice, confuse, mislead and outrage the trier of fact. Accordingly, petitioner argued that, if defendants were tried together, he would not receive a fair trial.

During the course of the trial, petitioner called witnesses Lee Juarez, an investigator for Blue Cross-Blue Shield and Kelvin Helmick, a regional representative of Multi State Drug Corporation, to establish that Dort did not simply

traffic in controlled substances; that, during the period of the conspiracy, defendant Taylor's prescriptions were filled by at least 34 other pharmacies. This picture of Williams' pharmacy had been drawn by the Assistant United States Attorney repeatedly throughout the trial. By example, in his opening statement, the Assistant United States Attorney stated that "approximately ninety percent of the prescriptions Mr. Williams, the pharmacist, was filling was from Roosevelt Taylor;" and "seventy percent of the prescriptions [Williams] was issuing were codeine based prescriptions." The government introduced Williams' total income, for both controlled and noncontrolled substances, for the years 1986 and 1987. Petitioner attempted to admit proposed Exhibits 9, 9A and 20 (Appendix p. D-1) into evidence but his motions were denied. Exhibit 9 consisted of five pages identifying various controlled substance codes used by Blue Cross-Blue Shield to identify drugs prescribed by various providers. Attached as part of petitioner's proposed Exhibit 9 were 18 pages consisting of prescriptions for both controlled and noncontrolled substances issued by defendant Taylor for the 12 months ending May 26, 1987. Proposed Exhibit 9A consisted of 35 pages, each containing the name of a pharmacy. Witness Juarez was called by petitioner Williams to identify the other pharmacies which had filled Taylor's prescriptions and the range of prescriptions, of both controlled and noncontrolled substances, he had issued over that period of time. The court denied the admission of Exhibit 9 because it did not distinguish controlled from noncontrolled substances and any reference to noncontrolled substances was irrelevant. Once Exhibit 9 was ruled inadmissible, the court held that any discussion of the admission of proposed Exhibit 9A was moot. Petitioner called witness Helmick for the purpose of laying a foundation for the admission of his proposed Exhibit 20, an analysis of both controlled and noncontrolled substance prescriptions filled by Dort during the period of the con-

spiracy. The court refused to admit Exhibit 20 citing its inclusion of noncontrolled substances as part of the analysis and thus its irrelevancy in these proceedings.

During the course of the trial, codefendants Taylor and Gurley repeatedly attempted to raise a defense based upon the duress and coercion related to government efforts to silence Taylor in his effort to expose an alleged plot by certain physicians, to implicate Taylor in a fraud against the Flint Osteopathic Hospital and others. Taylor and his brother, William Taylor, II, identified individuals who may have been acting as government undercover agents in this effort but failed to elicit evidence in support of that allegation. Defendant Taylor claimed, as well, that he was forced by the government to issue prescription drugs illegally. William Taylor, II, claimed he had been kidnapped by a certain "agent Louis" and another government agent. Finally, witness William Taylor, II, was permitted to read from a document authored by defendant Taylor describing his alleged kidnapping by government agents and a full description of the government's plot. "You see," defendant Taylor stated in the document read by his brother, "this was the federal prosecutor and Newblatt's [federal district court judge, Hon. Stewart Newblatt] way of getting the forfeiture count in the indictment, because these undercover agents would say to [United States Attorney] Havelan (sic) he wrote those prescriptions at his home in Ann Arbor." Defendant Taylor complained, in testimony, that there had been several attempts by the government to entrap him and he described the several threats made against him by an alleged government agent never identified at trial. In contrast, defendant Taylor's own witness, Ray C. Valley, an agent serving the Michigan Attorney General's office at the time he was first approached by defendant Taylor to investigate the "plot" against him, testified that defendant Taylor's version of events and charge of a government plot against him, was not valid. Other witnesses called by

defendant Taylor included Dr. Calvin Price, who was exposed as a suspected criminal on the record.

Finally, the only reference to any connectin between defendant Taylor, the physician charged with issuing illegal prescriptions, and petitioner, a pharmacist charged with filling them, was the testimony by a government informant who stated:

> The first time I went to [Dr. Taylor's] office I went to the closest available pharmacy and had trouble filling the prescription. There were two pharmacies and I went to both of them by his home and neither would accept his prescriptions and I went back to his home and asked where do I get it filled and [Dr. Taylor] said take it to Dort Prescription Center.

Petitioner repeatedly requested severance and mistrial but was repeatedly denied this relief.

Following closing arguments the court charged the jury and petitioner Williams was found guilty on both Counts 1 and 19 of the superseding indictment. The Sixth Circuit Court of Appeals affirmed the trial court's verdict and judgment and the petitioner seeks review by this Court.

In its *per curiam* decision, the Court of Appeals rejected, out of hand, petitioner's request for severance by noting that petitioner failed to specify which particular events sufficiently prejudiced his case to justify severance. The Court characterized petitioner's claim of prejudice as "unsupported allegations of codefendant misconduct and resultant prejudice." (Appendix p. C-6).

The Court of Appeals supported the trial court's decision to deny admission into evidence of certain exhibits, claiming that the trial court had considered the relevancy of those exhibits and that there was no abuse of discretion

in the exclusion of that evidence. (Appendix p. C-12). No mention is made in the Court of Appeals' decision, however, of proposed Exhibit 20. (Appendix p. D-1). Finally, the Court of Appeals cited the testimony of the government informant referred to above, together with references to petitioner's large purchase of codeine, the fact that petitioner kept a handgun in his place of business, that petitioner permitted certain customers to refill prescriptions for others and that during a "one month period" ninety-one percent of the prescriptions filled were written by defendant Taylor, as evidence of the conspiracy. (Appendix pp. C-7, C-8).

REASONS FOR GRANTING THE WRIT

I.

THE SIXTH CIRCUIT DECISION UPHOLDING THE TRIAL COURT'S DENIAL OF PETITIONER'S REQUEST FOR SEVERANCE WAS IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT AND OTHER CIRCUIT COURTS IN VIEW OF THE SUBSTANTIAL PREJUDICE TO PETITIONER.

Petitioner Williams, before and during trial and at the close of proofs, repeatedly pleaded for severance, citing Federal Rule of Criminal Procedure 14:

> Relief from Prejudicial Joinder.
>
> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election of separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the

> government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

The prejudice feared by petitioner Williams was that based upon defendant Taylor's bizarre conduct, his unreliable emotional state and his picaresque defense pitting the government's imagined conspiracy to defeat his efforts to uncover and report crime, against the conspiracy charged against him.

In the jury charge the trial court stated:

> Now, you should consider each instruction that I give you as applying separately and individually to each of the defendants on trial. While there are three defendants in this case, their guilt or innocence must be determined by you separately. There must be verdicts as to each of the defendants separately.

This was the court's single admonishment against confusing the defenses of Taylor and Gurley and the testimony of their witnesses with petitioner Williams.

The trial court noted, on at least two occasions, that defendant Taylor's claim of a government conspiracy might indeed prejudice petitioner Williams and should be considered vis-à-vis his request for severance. In response to petitioner's motion for severance, the court assured petitioner's counsel that he would "deal with" the matter if defendant Taylor's government conspiracy defense emerged during trial. Again, during the trial, the court assured petitioner's counsel that it would consider severance if "evidence surfaced that made it obvious that there was an injustice being done to [petitioner Williams]." The court repeatedly failed, however, in its efforts to prevent defendants Taylor and Gurley or their witnesses from alluding to the alleged

government conspiracy as well as the unrelated dispute between defendant Taylor and certain personnel at the Flint Osteopathic Hospital.

Unfortunately, much of this was presaged by matters of record which occurred prior to the filing of the superseding indictment.

In his pretrial Opinion and Order of Recusal, the first assigned trial judge, Hon. Stewart A. Newblatt, United States District Court, Eastern District of Michigan, Southern Division – Flint, noted that Taylor alleged a "Jewish-inspired conspiracy against him in terminating [him] from his staff position at Flint Osteopathic Hospital" and his belief that Judge Newblatt had manipulated Taylor's attorneys for the purpose of obtaining a conviction against him. In short, concluded Judge Newblatt, defendant maintains that, "I am a long-time member of a conspiracy to wrongfully injure the defendant." Although Judge Newblatt had found in December 1988 that defendant Taylor had been restored to competency after having been committed by the judge in December 1987, the court noted that, "being restored to competency does not mean total freedom from mental illness." Even after petitioner Williams was added as a defendant in the superseding indictment in March 1989, defendant Taylor continued to maintain that a government conspiracy was, for ulterior reasons, continuing its attempt to silence him and by its agents repeatedly threatened him with great bodily harm and death. The only earlier allegation not in evidence at trial was the characterization of the hospital-court mélange as "Jewish."

Petitioner Williams contends that the bizarre, antagonistic nature of Taylor's defense misled, confused and affronted the jury. So egregious was the confusion that only severance could have prevented it. The circumstances confronting petitioner Williams constituted a strong showing

of prejudice and rendered the jury unable to separate and treat distinctively evidence "that is relevant to each particular defendant on trial." *United States* v *Johnson*, 763 F.2d 773 (6th Cir. 1985). Petitioner Williams is mindful that, "absent a showing of substantial prejudice, spillover of evidence from one case to another does not require severance." *United States* v *Gallo*, 763 F.2d 1504 (6th Cir. 1985). Nevertheless, the defense raised by defendants Taylor and Gurley presented such a circumstance. Further, their odious defense and clear failure to support that defense, even with testimony from their own witnesses, mocked petitioner Williams' Fifth Amendment right to remain silent. Clearly, if petitioner Williams was to defend himself at trial in the face of Taylor's defense, he was required to speak out in his own defense. This violated his right to remain silent, and the fact that he chose not to testify and thus permitted Taylor's antics to carry the day should not be held against him. The jury under these circumstances was unable to consider the defendants' guilt separately, and this supports petitioner's request for severance. *United States* v *Scaife*, 749 F.2d 338, 344 (6th Cir. 1984).

Even if, *arguendo*, defendant Taylor's defense was not "antagonistic" in the usual sense, it was certainly misleading and confusing. The Sixth Circuit noted in *United States* v *Horton*, 847 F.2d 313, 317 (6th Cir. 1988) that, "to prevail [on a motion for severance], the defendants must show that 'antagonism between codefendants will mislead or confuse the jury.'" *United States* v *Kendricks*, 623 F.2d 1165, 1168 (6th Cir. 1980) (*per curiam*) (quoting *United States* v *Vinson*, 606 F.2d 149, 154 (6th Cir. 1979), *cert. denied* 444 U.S. 1074, 100 S.Ct. 1020, 62 L.Ed.2d 756 (1980)).

Nor does the court's refusal to grant severance appear to have been harmless error. The jury clearly did not "compartmentalize" the evidence and charges against each

defendant. Cf. *Gallo*, 763 F.2d at 1526. All of the defendants were charged in count one with conspiracy. The transparently false and often ludicrous defense presented by defendants Taylor and Gurley unfairly precluded *any* chance appellant may have had to prevail on his own.

Petitioner Williams is mindful that if he is to prevail on his request for severance on appeal to this Court, he bears the burden of showing "facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial. The defendant must demonstrate that he has suffered such prejudice as a result of the joinder, not that he might have had a better chance for acquittal at a separate trial." *United States* v *Rucker*, 586 F.2d 899 (2nd Cir. 1978). "Ultimately, the question is whether under the circumstances of the particular case, a properly instructed jury can follow the court's limiting instructions and assess each defendant's guilt or innocence solely on the basis of evidence admissible against him." *United States* v *Papia*, 560 F.2d 827 (7th Cir. 1977).

Petitioner Williams contends that the circumstances presented at trial precluded him from receiving a fair trial. By example only, defendant Taylor's own witness, an investigator formerly employed by the Michigan Attorney General, categorically invalidated and denied defendant Taylor's claim that he was the victim of a government conspiracy, rogue police investigators or "gangsters." This testimony was even more damaging given Taylor's brother's unbridled recitation of defendant's complaint against the authorities. Certainly, Dr. Price, a character witness called by defendant Taylor, destroyed any opportunity petitioner may have had to be separately judged on the evidence against him. The testimony of witness Price, amplified by the rebuttal testimony of Agent Meyer, suggested among other things another criminal event, entirely unrelated to the charges contained in the superseding indictment.

Petitioner Williams contends that the trial court's instruction could not cure the prejudicial error caused by the Price/Meyer testimony and indeed the entire of the Taylor/Gurley defense testimony. Moreover, all of this should have been anticipated by the court and cured by severance. This would have spared the jurors sitting in judgment of petitioner Williams from the spectacle of codefendants' defense, a defense so ill-conceived and ludicrous that it, perforce distracted, confused and offended. Moreover, the court did not carefully instruct the jury, as it might have, to consider solely the evidence admitted against each defendant as would have been prudent under the circumstances. *United States* v *Graham*, 548 F.2d 1302 (8th Cir. 1977). Petitioner Williams does not complain of an isolated outburst by either or both of his codefendants. Rather, the government's evidence against defendants Taylor and Gurley and the testimony of codefendants' own witnesses in support of the charges mandated severance. *United States* v *Brown*, 605 F.2d 389 (8th Cir. 1979).

The Sixth Circuit Court of Appeals, in its *per curiam* decision, ruled that petitioner Williams failed "to specify which particular events sufficiently prejudiced [his] case to justify a severance." (Appendix p. C-6). Petitioner respectfully disagrees. Instances and events which unfairly prejudiced petitioner Williams occurred repeatedly throughout trial and were noted by petitioner in his brief on appeal and argument. The entire Taylor/Gurley defense was so ill-conceived and ludicrous that it distracted, confused and offended the same jury sitting in judgment of petitioner Williams. This, juxtaposed with the paucity of evidence against petitioner, combined to irrevocably taint and unfairly prejudice petitioner Williams' own defense.

II.

THE SIXTH CIRCUIT DECISION UPHOLDING THE TRIAL COURT'S REFUSAL TO ADMIT CERTAIN EXHIBITS PURPORTING TO SHOW A MORE COMPLETE PICTURE OF PETITIONER'S BUSINESS ACTIVITY WAS REVERSIBLE ERROR AND IGNORED THE FAILURE OF THE TRIAL COURT TO PROPERLY CONSIDER RELEVANCY.

Petitioner's proposed defense Exhibits 9, 9A and 20 were not admitted into evidence because they contained reference to petitioner's pharmacy's sale of uncontrolled substances. Petitioner argued below that this evidence would give the jury a more accurate picture of his business activities and might blunt the government's effort to characterize over ninety percent of his business activities as illegal. Dort, according to the government, was a virtual clearing house for defendant Taylor's prescriptions. The government was repeatedly permitted to paint such a picture, especially by use of trial exhibits including the so-called ARCOS report. Petitioner Williams, on the other hand, was repeatedly refused permission to refer to its sale of noncontrolled substances or to legitimize and place in accurate perspective the apparently disproportionately-large volume of controlled substance sales. No similar restraint was placed upon the government. It was important that the jury know petitioner Williams' total business activity so that petitioner could effectively counter the government's allegation that he did very little else during the conspiracy except fill controlled substance prescriptions issued by defendant Taylor.

Even the government's opening statement referred to the percentage of Dort's total business that dealt with the filling of controlled substance prescriptions. Yet, whenever petitioner Williams attempted to admit evidence relating to either Taylor's total prescription business or reference to those pharmacies, other than Dort, with whom Taylor did business (Exhibits 9 and 9A), or relating to a fair picture

of petitioner Williams' business activity (Exhibit 20), the court would not permit him to do so.

Petitioner contends that the information contained in the proposed exhibits might, as well, have permitted the jury a more accurate perspective of the ARCOS report. Clearly, total business volume must be considered in assessing the significance of large purchases of codeine-based drugs for resale to the public. Moreover, to place petitioner's sales of controlled substances in proper perspective, the trier of fact certainly must know petitioner's total business volume during the period of the conspiracy.

Proposed Exhibit 20 (Appendix p. D-1) was offered by petitioner Williams in an attempt to explain the misleading statistics proferred by the government. Similarly, proposed Exhibits 9 and 9A contained facts relevant and material to the government's charge that defendant Taylor dealt almost exclusively with petitioner Williams and that Taylor's entire practice, in any event, was devoted to trafficking in controlled substances. Certainly, Dort was portrayed as a drug mill; its principal business was as a distribution center for controlled substances. Petitioner Williams contends that, once confronted with the government's various statistical analyses, he should have been afforded an opportunity to place those statistics in proper perspective by demonstrating the true ratio of Dort's controlled substance prescription revenues to its total business volume.

Petitioner certainly had a right to present a full defense, and if the court prevented him from doing so he has been deprived of due process of law as afforded him under the Sixth and Fourteenth Amendments to the United States Constitution. *Chambers* v *Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1972); *United States* v *Coor*, 533 F.2d 1042 (2nd Cir. 1976). Evidence, even if otherwise

inadmissible, must be admitted if it is necessary to correct a misleading impression. *United States* v *LeFevour*, 798 F.2d 977 (7th Cir. 1986). Federal Rule of Evidence 106 permits the admission of otherwise inadmissible evidence if it is necessary to correct a misleading impression. Such evidence may be admitted for this limited purpose or, if it is excluded for any reason, the misleading evidence must be excluded as well. Since the government has conceded that its case against petitioner Williams was based, in major part, upon the statistical analysis of its controlled substance business (Appendix p. C-7), then it must follow that any evidence offered by petitioner to skew the statistics in his favor should have been admitted. Otherwise, the jury must have been left with the impression that Dort Drug Corporation dealt in controlled substances and very little else.

The Sixth Circuit Court of Appeals, in its *per curiam* opinion, considered petitioner Williams' claim regarding the admissibility of trial Exhibits 9, 9A and 110 but failed to comment upon the trial court's refusal to admit Exhibit 20. Petitioner Williams argued in his brief and at oral argument that the government characterized his pharmacy as a drug mill and supported this claim by admitting statements, exhibits and testimony which referred to Williams' total business and business revenues. As noted above, the Assistant United States Attorney made reference to this fact in opening statement, and by introducing the testimony of government witness Michael Smith; by begging a comparison between Williams' controlled substance business and other prescription business done at the pharmacy. Specific reference was made by the government to petitioner's total revenue based on all prescriptions filled on the premises. Certainly, this reference opened the door to a comparison by petitioner of business done by Taylor with other pharmacies (proposed Exhibits 9 and 9A) and evidence of Dort Pharmacy's total business activity (proposed

Exhibit 20). The court ignored those considerations even though it would have placed the governments accusations in a fairer context and perspective vis-à-vis the alleged Williams-Taylor connection.

III.

PETITIONER WILLIAMS' CONVICTION OF CONSPIRACY WAS BASED UPON INSUFFICIENT EVIDENCE OR WAS AGAINST THE GREAT WEIGHT OF THE EVIDENCE AND WAS IN CONFLICT WITH DECISIONS OF THE SIXTH CIRCUIT AND OTHER CIRCUIT COURTS.

As noted by the Court of Appeals, citing *United States* v *Blasco*, 702 F.2d 1315, 1330 (11th Cir. 1983) and *United States* v *Pearce*, 912 F.2d 159, 161 (6th Cir. 1990), "[A] defendant may not be convicted unless the evidence adduced at trial is sufficient to demonstrate his own complicity beyond a reasonable doubt. Guilt by association may not attach; the prosecution must individualize its proofs as to each alleged conspirator." *Blasco*, 702 F.2d at 1330. Further, "[A] conspiracy conviction should be affirmed 'unless there is insufficient evidence from which a rational jury member could find beyond a reasonable doubt that the defendant was a member of the conspiracy.'" *Pearce*, 912 F.2d at 161. The Court of Appeals further noted that it required, "'firm evidence of at least tacit coordination among conspirators in affirming conspiracy convictions.'" Citing *Pearce* at 162. (Appendix pp. C-6, C-7).

Petitioner contends that the Court of Appeals ignored these holdings of law and should be reversed.

Arguendo, petitioner Williams might have been charged on the evidence presented at trial of diverse crimes including mail fraud or some variation of fraud against Blue Cross-Blue Shield for improper or fraudulent billing. These charges might have been supported by evidence that

petitioner filled prescriptions for no legitimate medical purpose; that he billed Blue Cross-Blue Shield for brand-name drugs when in fact he had sold generic; or that he filled prescriptions issued by a physician he knew to be unlicensed to prescribe controlled drugs. Proof of conspiracy, however, is another matter. Conviction on the substantive crime is not even a prerequisite to culpability on a criminal charge. *United States* v *Garcia*, 655 F.2d 59, 62 (5th Cir. 1981). The prosecution must prove that a conspiracy existed: namely, an agreement between two or more people to do an illegal act. The individual charged must have had knowledge of at least the objectives of the conspiracy and, knowing these objectives, participated in it. *Blasco*, 702 F.2d at 1330.

Petitioner Williams argues that there was insufficient evidence to convict petitioner, or that the jury verdict was against the great weight of the evidence.

Petitioner Williams does not believe the government proved the existence of a conspiracy between himself and any other person.

Petitioner is mindful that "it is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find the evidence establishes guilt beyond a reasonable doubt. The jury is free to choose among reasonable constructions of the evidence." *United States* v *Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (Unit B *en banc*, *cert granted* 103 S.Ct. 444 (1982)). Nevertheless, apart from evidence which may support a substantive charge, the record does not contain evidence sufficient to find petitioner Williams guilty beyond a reasonable doubt on the conspiracy charge. Even though the jury may consider both direct and circumstantial evidence, no evidence was elicited, circumstantial or otherwise, which supported the verdict.

Not one of the several witnesses testifying either for the government or codefendants suggested any agreement between petitioner Williams and codefendants to do an illegal act, much less the unlawful delivery of controlled substances. Dort Drug Corporation is refereed to several times but only once significantly: as noted above, witness Thompson, a government informant, claimed that he was on one occasion told by defendant Taylor to take a prescription written by Taylor to Dort Prescription Center to be filled. This, arguably, may even have occurred after the conspiracy had ended.

There is no reference to petitioner Williams by any witness indicating, even by inference, an agreement between Williams and Taylor or Gurley to unlawfuly distribute controlled substances. Moreover, several of the witnesses deny any reference to Williams or Dort as the pharmacy of choice among defendant Taylor's patients/customers. An undercover agent admitted that nothing she learned in her undercover work with defendants Taylor and Gurley indicated that petitioner Williams even knew defendant Taylor. In fact, her first of only two visits to Dort occurred in the Spring of 1989, over a year after the charged conspiracy had ended. Defendant Taylor denied any contact with petitioner until he solicited legal defense money from him in 1989. Defendant Gurley claimed that he patronized Dort because his family had patronized it before him. And the attention of DEA Agent Woodward was, as noted above, not drawn to Williams' activities until October or November 1987, again, after the charged conspiracy had ended. Woodward, in subsequent testimony noted, in answer to a question by Gurley's counsel, that while investigating Taylor and Gurley, "we were not aware of really what Mr. Williams was doing or not doing."

Petitioner may have conducted the business at his pharmacy in a manner and contrary to federal and state law. He

did, as is abundantly clear from the record, fill controlled substance prescriptions issued by defendant Taylor and others. Even if the evidence is considered in a light most favorable to the government, and petitioner Williams does not prevail in his claim of error concerning Exhibit 20, it is clear that a large percentage of the controlled substance prescriptions filled by petitioner were issued by Taylor. This nexus, at best, cannot support the inference that petitioner agreed with defendant Taylor to commit an illegal act. Certainly, Williams and Taylor were "associated" by this fact. Nevertheless, this association cannot be the basis for a verdict of guilty. "Guilt by association may not attach," as a result of this tenuous relationship. *Blasco*, 702 F.2d at 1330. Accordingly, petitioner Williams contends, for the purpose of this criminal appeal, the evidence against him was insufficient to support a verdict of guilty on Count 1 of the indictment.

The evidence cited by the Court of Appeals in its opinion may, at best, support charges of unrelated acts of criminal conduct but not conspiracy. (Appendix pp. C-7, C-8).

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner contends that the Court of Appeals failed to properly consider prior decisions of the Sixth Circuit and other circuit courts and that its decision on the questions presented here is in conflict with prior decisions of the circuit courts.

Respectfully submitted,

By: /s/ LAWRENCE W. RATTNER
Counsel of Record

30833 Northwestern Highway, Suite 200
Farmington Hills, Michigan 48334
(313) 932-3230

Attorney for Petitioner

Dated: February 15, 1991

APPENDICES TO PETITION FOR CERTIORARI

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APPENDIX A

ORDER GRANTING STAY OF MANDATE

(United States Court of Appeals — Sixth Circuit)

(Filed January 16, 1991)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIE J. WILLIAMS, Defendant-Appellant — No. 89-2384)

Upon consideration of the appellant's motion to stay the mandate pending application for a writ of certiorari to the Supreme Court,

It is **ORDERED** that the motion be, and it hereby is, GRANTED. The mandate shall be stayed for 30 days from the date of this order pending said application.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

(*Certification Omitted*)

APPENDIX B

ORDER DENYING REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed December 13, 1990)

(UNITED STATES OF AMERICA, Plaintiff-Appellee, v. WILLIE J. WILLIAMS, Defendant-Appellant — No. 89-2384)

BEFORE: JONES and WELLFORD, Circuit Judges,
ENGEL, Senior Circuit Judge

Upon consideration of the appellant's petition for rehearing before the original panel,

It is **ORDERED** that the petition be, and it hereby is, DENIED. The panel adheres to its previous decision.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

(Certification Omitted)

APPENDIX C

OPINION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

This notice is to be prominently displayed if this decision is reproduced.

(United States Court of Appeals — Sixth Circuit)

(Filed November 13, 1990)

(**UNITED STATES OF AMERICA**, Plaintiff-Appellee, v. **WILBERT M. GURLEY**; **ROOSEVELT TAYLOR**; AND **WILLIE J. WILLIAMS**, Defendants-Appellees [sic, -Appellants] — ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN — Nos. 89-2384/89-2418/90-1071)

BEFORE: **JONES** and **WELLFORD**, Circuit Judges, and **ENGEL**, Senior Circuit Judge.

PER CURIAM.

Defendants-appellants Wilbert Gurley, Dr. Roosevelt Taylor, and Willie Williams appeal their convictions for conspiracy to illegally distribute prescription drugs. Williams also appeals the district court's order of forfeiture. For the following reasons, we affirm the convictions and the order of forfeiture.

I

On March 10, 1989, a superceding [sic] indictment[1] was filed charging defendants-appellants Dr. Roosevelt Taylor,

[1] The original grand jury indictment, filed on July 22, 1987, charged Dr. Taylor with ninety-six counts of unlawful distribution of controlled sub-

(continued on page C-2)

Wilbert Gurley, and Willie Williams with conspiracy to illegally distribute prescription drugs, in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. § 846. Counts two through fifteen charged Taylor with unlawful distribution of controlled substances, in violation of 21 U.S.C. § 841(a)(1). The superceding indictment also charged Gurley with unlawful delivery of valium and talwin, in violation of 21 U.S.C. § 841(a)(1). Allegations of forfeiture were filed pursuant to 21 U.S.C. § 853 with respect to Taylor's home and Williams' motor home.

Dr. Roosevelt Taylor was a physician at Flint (Michigan) Osteopathic Hospital (FOH) for nearly twenty years before his privileges were revoked in 1980. Dr. Taylor sued FOH claiming that he was suspended from the hospital because he threatened to expose insurance fraud. His suit against FOH was dismissed in 1984. Willie Williams was the owner and operator of the Dort Prescription Center in Flint between 1985 and 1987. The indictment alleged that: (1) over a period of nearly two years Dr. Taylor wrote numerous prescriptions for controlled substances without a license and without a legitimate medical purpose; (2) Williams accepted the prescriptions, and dispensed them in generic form while billing at brand-name prices; and (3) Gurley assisted Dr. Taylor in the illegal distribution of prescription drugs.

A jury trial began on July 18, 1989. Gurley, Williams, and Taylor were found guilty on all counts on August 10, 1989. In December, 1989, Taylor was sentenced to concurrent prison terms of eight, three, and one years; Gurley was sentenced to one year concurrent terms on each count;

(continued from page C-1)

stances, in violation of 21 U.S.C. § 842(a)(1). Count ninety-seven alleged a forfeiture pursuant to 21 U.S.C. § 853. The same indictment charged Gurley with three counts of delivery of valium and one count delivery of talwin, in violation of 21 U.S.C. § 841(a)(1).

and Williams was sentenced to a six year term and a $ 15,000.00 fine. In addition, Williams was ordered to forfeit his motor home as well as all interest in the Dort Prescription Center, and Taylor was ordered to forfeit his residence. These timely appeals followed.

II

Taylor's first argument is that the district court erred in preventing him from presenting a portion of his duress defense. At trial, Taylor sought to defend against charges that he wrote prescriptions without any legitimate medical purpose by claiming that he was threatened by government agents. These threats, as well as his prosecution, asserts Taylor, were part of a conspiracy against him by state and federal officials because of his attempts to expose insurance fraud at FOH.

Counsel for Taylor first raised the selective prosecution issue during opening statements. At that point, the district court dismissed the jury and allowed Taylor's lawyer to make an offer of proof. J. App. at 483-84. Taylor then testified about his contacts with individuals who he believed were from the U.S. Attorney's office and who threatened him with bodily harm because of his knowledge of insurance fraud at FOH. J. App. at 490-504. The district court found, at the conclusion of the hearing, that there was no evidence of a connection between these individuals and the U.S. attorney's office.

Taylor's lawyer then argued that because Taylor believed the conspiracy to be true, he should be entitled to present all aspects of his theory of duress. *Id.* at 537. The district court ruled that because of a lack of evidence, Taylor would not be permitted to allege that this prosecution was instigated by FOH, working with the government, "to shut Dr. Taylor Up." *Id.* at 857. The court allowed Taylor to present evidence as to other threats or intimidations against Taylor.

Id. At other points during the trial, the district court precluded Taylor from introducing evidence of his dispute with FOH. *Id.* at 891-92, 981, 1029-30.

We review the district court's exclusion of Taylor's testimony regarding the "conspiracy" under an abuse of discretion standard. *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988). An abuse of discretion exists with respect to an evidentiary ruling "when the reviewing court is firmly convinced that a mistake has been made." *Id.* This court requires a defendant asserting a duress defense to show "an immediate threat of death or serious bodily harm . . . in a situation in which there was no opportunity to avoid the danger." *United States v. Campbell*, 675 F.2d 815, 821 (6th Cir.), *cert denied sub nom, Fultz v. United States*, 459 U.S. 850 (1982) (quoting *United States v. Campbell*, 609 F.2d 922 (8th Cir. 1979), *cert denied*, 445 U.S. 918 (1980)). In addition, "[i]f evidence is introduced, but it is apparent that all of the requirements of the coercion defense are not addressed, the trial court is not obligated to allow the evidence to remain for consideration by the jury." *Id.*

Taylor wanted to include his dispute with FOH as a part of his duress defense to provide a context for his belief that the threats were real. The district court did, in fact, instruct the jury on Taylor's duress defense. J. App. at 1221. Moreover, the district court went to great lengths throughout the trial to ascertain Taylor's theory of defense, and gave Taylor ample opportunity to present any relevant evidence. Even Taylor's lawyer conceded that he had been given "all kinds of latitude in this case." *Id.* at 1028. The district court found, however, that the possibility the jury could be confused or misled by the "conspiracy" involving FOH outweighed its probative value. Furthermore, the district court found that there was no evidence, other than Taylor's own testimony, to support his theory that he was

being prosecuted for exposing fraud at FCH. As a result, we find that the district court did not abuse its discretion in excluding testimony concerning Taylor's relationship with FCH.

III

Both Gurley and Williams argue that they were prejudiced by the district court's denial of their motions for severance. Fed. R. Crim. P. 14 allows a trial judge to sever defendants or grant separate trials if a party would be "prejudiced." The district court's denial of defendants' motions for severance is reviewed under an abuse of discretion standard. *United States* v. *Scaife*, 749 F.2d 338, 344 (6th Cir. 1984). To show an abuse of discretion, defendants must make "a strong showing of prejudice . . . [such that] the jury was unable to separate the evidence against each defendant." *Id.* Even if there is some prejudice, "this factor must be balanced against society's need for speedy and efficient trials." *Id.*

Gurley and Williams argue that "the bizarre, antagonistic nature of Taylor's [conspiracy] defense misled, confused and affronted the jury, and only severance could have prevented it." Gurley Grief at 27. In support, Gurley and Williams point to the testimony of Dr. Price, who was called as a character witness for Dr. Taylor. After it was revealed that Price had distributed cocaine to a government witness in this case, Price's testimony was stricken. Williams and Gurley now assert, without further elaboration, that this testimony destroyed any opportunity for their defenses to be evaluated separately by the jury.

The district court instructed the jury to evaluate each defendant separately:

> Now, you should consider each instruction that I give you as applying separately and individually to each of the defendants on trial. While there are

> three defendants in this case, their guilt or innocence must be determined by you separately. There must be verdicts as to each of the defendants separately.

J. App. at 1220.

As the government points out, Williams and Gurley fail to specify which particular events sufficiently prejudiced their cases to justify a severance. *United States* v. *Graham*, 548 F.2d 1302, 1311 n.8 (8th Cir. 1977) ("[U]nsupported allegations of co-defendant misconduct and resultant prejudice are insufficient to justify a finding that the District Court abused its discretion in not granting their motions for severance."). Because Williams and Gurley have not demonstrated with sufficient detail that they were prejudiced at trial by Taylor's defense, we conclude that the district court's denial of their motions for severance was not an abuse of discretion.

IV

Williams and Gurley argue that the evidence is insufficient to support their convictions for conspiracy under 21 U.S.C. § 846. Gurley asserts that "[n]ot one of the several witnesses testifying either for the Government or the co-defendants suggested any agreement between defendant and the co-defendants to agree to do any illegal act[.]" Gurley Brief at 22. Williams argues that although he filled prescriptions issued by Dr. Taylor, the evidence does not support a finding of conspiracy to commit an illegal act. Both Williams and Gurley rely on *United States* v. *Blasco*, 702 F.2d 1315, 1330 (11th Cir. 1983), for the propositions that "[a] defendant may not be convicted unless the evidence adduced at trial is sufficient to demonstrate his *own* complicity beyond a reasonable doubt. Guilt by association may not attach; the prosecution must individualize its proofs as to each alleged conspirator."

A conspiracy conviction should be affirmed "unless there is insufficient evidence from which a rational jury member could find beyond a reasonable doubt that the defendant was a member of a conspiracy." *United States* v. *Pearce*, 912 F.2d 159, 161 (6th Cir. 1990) (citation omitted). This court requires "firm evidence of at least tacit coordination among conspirators in affirming conspiracy convictions." *Id.* at 162.

We find that, viewed in the light most favorable to the prosecution, there was sufficient evidence to support the conspiracy convictions. Testimony established that during the first quarter of 1987, Dort Prescription Center was the ninth largest purchaser of codeine-based products out of over 2,000 pharmacies in Michigan. J. App. at 562. An audit of Dort's inventory for half of 1986 and 1987 revealed significant shortages of codeine-based drugs and valium. *Id.* at 591-92. Williams kept a handgun within reach inside the pharmacy. *Id.* at 593. Williams also allowed at least eleven customers to refill prescriptions using multiple names, some using as many as fifteen or twenty names within a period of several months. In addition, during a one-month period in 1987, 91% of the prescriptions issued by Williams through Dort Prescription Center were written by Dr. Taylor. *Id.* at 604. During this period, Taylor did not have a license to issue prescriptions for controlled substances. *Id.* at 771. Dort also maintained very sporadic business hours. The pharmacy would be closed, and then open up and carloads of people would be in the parking lot. *Id.* at 723-24. An individual who worked next door to Dort testified that he observed individuals leaving the pharmacy and exchanging money and packages in the parking lot, and that most of Dort's customers were between eighteen and thirty-five years old. *Id.* at 724-25. A government informant, for whom Taylor wrote over 200 prescriptions without any medical examinations, also testified that Dort

was the only pharmacy which would take Taylor's prescriptions. *Id.*at 699. Another informant testified as follows:

> The first time I went to [Dr. Taylor's] office I went to the closest available pharmacy and had trouble filling the prescription. There were two pharmacies and I went to both of them by his home and neither would accept his prescriptions and I went back to his home and asked where do I get it filled and [Dr. Taylor] said take it to Dort Prescription Center.

J. App. at 739.

With respect to Gurley, an undercover police officer met him inside Taylor's home/office and purchased 400 valium and talwin tablets there from Gurley. Another government witness

testified that he saw Gurley at Taylor's house over a dozen times "direct[ing] traffic" among buyers "lining up outside around the house." *Id.* at 736. Gurley's own testimony revealed that he filled prescriptions in several different names that were filled at Dort, and that Taylor wrote many prescriptions for Gurley as well. *Id.*at 1107, 1109, 1122.

Based on the aforementioned testimony, we find that there was sufficient evidence to support the conspiracy convictions of Williams, Taylor, and Gurley.

V

Taylor and Gurley assert that the delays between their initial indictments on July 22, 1987, and the commencement of the trial on July 18, 1989 violated their rights under the Speedy Trial Act and the sixth amendment. This period included a sixteen-month delay due to Dr. Taylor's mental incompetency to stand trial between August 1987 and December 1989.

The Speedy Trial Act, 18 U.S.C. § 3161 *et seq.*, requires that a criminal defendant be brought to trial within seventy days of an indictment or the indictment should be dismissed. Section 3161(h) provides that certain periods of time may be excluded when calculating the seventy day period. Section 3161(h)(1)(A) excludes any "delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant[.]" Section 3161(h)(4) exempts "Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." Other excludable periods of time are:

> (7) A reasonable period of delay when the defendant is joined for trial with a codefendant as to whom the time for trial has not run and no motion for severance has been granted.
>
> (8)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.

The district court's determination of the period of time which should be excluded from consideration under the Speedy Trial Act should be affirmed unless it is found to be clearly erroneous. *United States* v. *Frey*, 735 F.2d 350, 352 (9th Cir. 1984). Taylor argues that his period of incompetency should not be excluded because "nothing changed during his period of commitment" in that he continued to assert his conspiracy theories regarding FOH after he was declared competent to stand trial. Taylor Brief at 28. Taylor does not cite any authority for the proposition that because

his theory of defense remained the same, his period of incompetency for trial should not be excluded. Thus, this sixteen-month period is excludable time. Moreover, this court has followed the majority of circuits in holding that, under section 3161(h)(7), '"an exclusion applicable to one defendant applies to all co-defendants.'" *United States* v. *Holyfield*, 802 F.2d 846, 847 (6th Cir. 1986) (per curiam), *cert. denied*, 479 U.S. 1090 (1987). Thus, the sixteen-month exclusion applies to Gurley as well.

On December 28, 1988, Judge Newblatt "determined that the ends of justice will be served by starting excludable time December 22, 1988 until February 28, 1989 for the purpose of allowing Mr. Gurley to retain counsel and to allow counsel for both defendants a reasonable amount of time for the effective preparation of the case. 18 U.S.C. § 3161(h)(8)(B)(iv)." J. App. at 180. Between February and May 1989, the district court was preoccupied with motions from Williams and Gurley dealing with a continuance, severance, discovery, suppression, and a bill of particulars. J. App. at 185, 205-29. This period of time is excludable under section 3161(h)(1)(F), which excludes "delay resulting from any pretrial motion[.]" *United States* v. *Darby*, 744 F.2d 1508, 1517-18 (11th Cir. 1984), *cert. denied sub nom*, *Yamanis* v. *United States*, 471 U.S. 1100 (1985) (excluding time between filing and denial of motions). We conclude that Taylor and Gurley's Speedy Trial Act claims are without merit because once the excluded time is subtracted, the total delay was less than seventy days.

Gurley and Taylor also assert that their sixth amendment rights to a speedy trial were violated. To evaluate such claims, this court applies a four-part test weighing '"[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.'" *Holyfield*, 802 F.2d at 848 (quoting *Barker* v. *Wingo*, 407 U.S. 514, 530 (1972)). Although the length of delay in this

case , nearly two years, was considerable, the reasons for the delay do not augur in defendants' favor. The incompetency of Taylor, Gurley's substitution of counsel, the superceding indictment, and the filing of motions were responsible for the delay. During this period, the defendants did not adequately raise the speedy trial issue, although Gurley did address the issue in response to the district court's show cause order in March 1988. J. App. at 132-36. Gurley complains that the lengthy delay prejudiced him because hs suffered "anxiety and concern" and because he had to stand trial with "the bizarre Dr. Taylor." Gurley Brief at 15. Taylor claims prejudice because his glaucoma condition worsened during the delay, which made it difficult for him to read much of the evidence in the case. In weighing these factors, however, we cannot conclude that Gurley or Taylor's sixth amendment rights were violated.

VI

Williams argues that the district court abused its discretion in not admitting his proposed exhibits 9, 9A, and 110. Exhibit 9 was Blue Cross/Blue Shield records regarding payments for drugs to Dr. Taylor. Exhibit 9A was a list of pharmacies other than Dort with which Taylor did business. Williams states that because the government was allowed to characterize Dort as a center of illegal drug activity, he should be able to present evidence to rebut the allegation that Dort did little except fill prescriptions for Taylor. Williams asserts that these exhibits should have been admitted to present an accurate picture of his total business volume. As the government states that 90% of Dort Prescription Center's business was through Dr. Taylor, Williams attempted to use this evidence to show that the 90% figure was incorrect.

The district court's determinations regarding admission of evidence are reviewed under an abuse of discretion stan-

dard. *Schrand v. Federal Pacific Elec. Co.*, 851 F.2d 152, 157 (6th Cir. 1988). The district court excluded the evidence as not relevant because the chart dealt with non-controlled items as well as controlled items, and it was not possible to ascertain from looking at the chart which were for the controlled substances. J. App. at 944-45, 1150-51. Thus, because it was not possible to differentiate the controlled from the non-controlled prescriptions, the district court concluded that admission of exhibits 9 and 9A would not accomplish any purpose. *Id.* at 1152.

The record reveals that the district court carefully considered the relevancy of exhibits 9 and 9A on more than one occasion, and took great care to determine if the differences between controlled and non-controlled substances could be discerned from the document itself. Given the district court's conclusion that the exhibits could not accomplish the purpose for which they were offered, we do not find an abuse of discretion in the exclusion of the evidence.

Williams also argues that the district court abused its discretion in admitting government's exhibit 110. Exhibit 110 was a prescription written by Dr. Patel in 1988 to a government witness and filled by Williams. Exhibit 110A, a police lab analysis of the drugs, was excluded by the district court because the prescription was written by a non-defendant outside the dates of the indictment. *Id.* at 935-36. Williams states exhibit 110 should not have been admitted because it was not evidence of an act in furtherance of the conspiracy, which ended in August 1987. The government claims the evidence was offered to support its claim that Williams distributed generic drugs but billed for brand name drugs. Government Brief at 39.

Williams fails to show how he was prejudiced through introduction of the exhibit. In addition, exhibit 110 need

not have been introduced solely in order to demonstrate an overt act in furtherance of the conspiracy. The evidence could have been admitted to show intent, motive, or knowledge under Fed. R. Evid. 404(b). *United States* v. *Young*, 573 F.2d 1137, 1140 (9th Cir. 1978). Thus, we conclude that the district court did not abuse its discretion in admitting exhibit 110.

VII

Gurley's final argument is that the district court incorrectly denied his request to instruct the jury as to his duress claim. The judgment of the district court should not be disturbed on the basis of faulty jury instructions unless the instructions, "viewed as a whole, were confusing, misleading and prejudicial." *Kitchen* v. *Chippewa Valley Schools*, 825 F.2d 1004, 1010-11 (6th Cir. 1987).

Gurley's claim of duress focuses on the events of March 10, 1987, when Gurley arrived at Taylor's office and testified that he saw suspicious-looking characters and that he felt threatened because they looked like gangsters. As a result, Gurley suggests that his sale of drugs to these individuals was under duress. The district court instructed the jury as to Dr. Taylor's theory of duress, but declined to do so with respect to Gurley because it found that there was no evidence whatsoever that Gurley was in any way the object of duress or coercion. J. App. at 1205. Gurley failed to establish the three elements of the duress defense — immediate threat of serious injury, well-grounded fear the threat would be carried out, and no chance of escape. As a result, we find that the district court's jury instructions do not merit reversal of the verdict.

VIII

Finally, Williams argues that the motor home cannot be forfeited because it was owned by Dort Drug Corporation and not by him. Williams cites case law stating that forfeiture can only be applied to an item if the *owner* of the item is convicted of a crime. *United States* v. *Unit No. 7 and Unit No. 8*, 853 F.2d 1445, 1449 (8th Cir. 1988).

The government apparently concedes that Williams personally does not own the motor home, because its argument on appeal is that Williams does not have standing to assert the rights of a third party, the Dort Drug Corporation. The government has also filed a civil complaint in the Eastern District of Michigan seeking to recover the motor home (*United States* v. *1983 Chevrolet Motor Home*, No. 90-40038). The effect of the criminal forfeiture in this case, the government now argues, was to "merely extinguish[] any interest Willie Williams may have in the motor home." Government Brief at 45.

A subsequent civil forfeiture action should not affect this court's review of the instant case.[2] Williams does not point to, nor can we detect, any errors by the district court which would require that the judgment of forfeiture be disturbed. Thus, the judgment of forfeiture should be affirmed.

IX

For the foregoing reasons, the judgment of forfeiture, and the convictions of Williams, Gurley, and Taylor, are **AFFIRMED**.

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[2] The civil action is currently pending in the district court before Judge Feikens. On August 31, 1990, an order extending stay of execution of judgment was entered. Apparently because he retains possession of the motor home, Williams was ordered to pay an $11,000 cash surety bond to secure the government's claim in the motor home.

APPENDIX D

DEFENDANT'S PROPOSED EXHIBIT 20

DATE	1-86	10	11	12	1-87	2	3	4	5	6	7	8
TOTAL SCRIPTS	1088	1229	1481	1288	1394	1552	1833	2041	2118	1775	1821	1032
TOTAL SCHEDULE III - V	100	190	207	335	408	483	676	904	1306	996	1125	423
% TOTAL SCHEDULE III - V	9%	15%	21%	27%	29%	31%	36%	44%	61%	56%	61%	41%
TOTAL SCHEDULE III - V FOR Dr. RT.	16	40	66	235	268	369	564	786	1183	901	1047	317
% TOTAL SCHEDULE III - V FOR Dr. RT.	16%	21%	31%	70%	65%	76%	83%	86%	90%	90%	93%	74%
% OF ALL SCRIPTS From Dr. RT	1%	3%	6%	18%	19%	23%	30%	38%	55%	50%	57%	30%
TOTAL Non-Controlled Substance SCRIPTS From Dr. RT	—	—	—	—	75	86	161	124	167	97	92	21

DEFENDANT'S EXHIBIT 20

APPENDIX E

ORDER EXTENDING STAY OF EXECUTION OF JUDGMENT AND ORDER OF FORFEITURE AND STAYING OF PROCEEDINGS IN RELATED CIVIL ACTION FOR FORFEITURE

(United States District Court —
Eastern District of Michigan)

(Filed March 30, 1990)

(UNITED STATES OF AMERICA vs. WILLIE J. WILLIAMS, Defendant — CASE NO. 87-CR-50057DT03; HON. JOHN FEIKENS)

At a session of said court held in the City of Detroit, Wayne County, Michigan on March 30, 1990.

PRESENT: HONORABLE JOHN FEIKENS,
U.S. DISTRICT COURT JUDGE.

This matter having come on to be heard on the petition of Willie J. Williams, defendant, requesting extension of the stay of execution of the Judgment and Order of Forfeiture concerning a 1983 Chevrolet motor home VIN #2GBJG31MOD4151646 entered by this Court on December 6, 1990 [*sic*, *1989*], a hearing having been held thereon and the United States of America having appeared by and through Assistant United States Attorney Mark C. Jones and defendant Williams having appeared represented by his counsel Lawrence W. Rattner, and the court having been advised that defendant Williams has filed a Notice of Appeal of said Judgment, and being further advised that the United States has commenced a civil action for forfeiture of said 1983 Chevrolet motor home in this Court, which action has been assigned Civil Case No. 90-CV-40038-FL and has been assigned to Hon. James Churchill, and being further fully advised in the premises:

IT IS HEREBY ORDERED that execution and any further proceedings upon the Judgment and Order of Forfeiture entered December 6, 1990 [*sic*, *1989*], a copy of which is attached hereto, and the proceedings in Case No. 90-CV-40038-FL entitled *United States of America* v *One 1983 Chevrolet Motor Home, VIN 2GBJC31MOD415646*, shall be and the same are hereby granted until such time as defendant has completed the appellate process relating to said Judgment and Order of Forfeiture.

IT IS FURTHER ORDERED that defendant Willie J. Williams shall post cash or surety bond with the Clerk of this Court in the principal sum of $ 11,000.00 forthwith to secure the government's claim against the subject 1983 motor home.

/s/ JOHN FEIKENS
U.S. DISTRICT COURT JUDGE

APPROVED FOR ENTRY:
NOTICE OF ENTRY WAIVED:
/s/ MARK C. JONES P33325
ASSISTANT UNITED STATES ATTORNEY

(*Certification Omitted*)

APPENDIX F

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO-245 (9/82)

(United States District Court —
Eastern District of Michigan)

(Filed December 7, 1989)

(United States of America vs. WILLIE J. WILLIAMS, Defendant — DOCKET NO. 87-CR-50057-DT-03)

COUNSEL

In the presence of the attorney for the government, the defendant appeared in person on this date: *DEC. 04, 1989*
☒ WITH COUNSEL: *Lawrence Rattner*

PLEA

☐ GUILTY ☐ NOLO CONTENDERE ☐ NOT GUILTY

FINDING & JUDGMENT

There being a verdict of: ☒ GUILTY,
Defendant has been convicted as charged of the offense(s) of:

conspiracy to illegally distribute prescription drugs — Schedule II-V Controlled Substances, in violation of United States Code Title 21, Section 841(a)(1) and 846, as to Count 1 of the Superseding Indictment; and Criminal Forfeiture (of 1983 Chevrolet motorhome), in violation of United States Code Title 21, Section 853, as to Count 19 of the Superseding Indictment.

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no

sufficient cause to the contrary was shown or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of:

six (6) years, under United States Code Title 18, Section 4205(b)(2).

A committed fine of $ 15,000.00 is imposed.
A special assessment fee of $ 15,000.00 is imposed.

As to Count 19 of the Superseding Indictment an Order of Forfeiture was entered.

SPECIAL CONDITIONS OF PROBATION

The defendant's bond is continued for 60 days at the end of which time he will voluntarily surrender to the designated institutions.

* * *

/s/ *John Feikens,*
U.S. Magistrate

Date: *December 7, 1989*

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

(Certification Omitted)

APPENDIX G

JUDGMENT AND ORDER OF FORFEITURE

(United States District Court —
Eastern District of Michigan, Southern Division – Flint)

(Filed December 6, 1989)

(UNITED STATES OF AMERICA, Plaintiff, vs. ROOSEVELT TAYLOR, WILBERT MONROE GURLEY, and WILLIE J. WILLIAMS, Defendants — CRIMINAL NO. 87-50057-CZ; HONORABLE JOHN FEIKENS)

Pursuant to Count Nineteen of the Superseding Indictment filed on March 10, 1989, the jury verdict of August 10, 1989, and 21 U.S.C. § 853,

IT IS HEREBY ORDERED AND ADJUDGED that all right, title, and interest of Willie J. Williams, Dort Drug Corporation, Dort Prescription Center, Inc., Onion [*sic, Union*] Drug Corporation, Williams' Union Prescription Center, Inc. and Union Drug Corporation in a 1983 Chevrolet motor home, VIN #2GBJG31MOD4151646, is declared forfeited to the United States of America or its assignees.

IT IS ALSO ORDERED AND ADJUDGED that Willie J. Williams or his agent turn over all keys to the above-described vehicle in his possession or under his control to Special Agent Craig Meyer of the Federal Bureau of Investigation, 204 Federal Building, Flint, Michigan TX 313-766-5171, or his assignees, forthwith.

/s/ JOHN FEIKENS
United States District Judge

Dated: DEC. 6, 1989

(*Certification Omitted*)